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Compulsory Arbitration of Labor Disputes Affecting Public Utilities

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WE ARE concerned here with the technique of compulsory arbitration as applied to labor disputes affecting public utilities. Our real concern is the use of this compulsory process as a means of enforcing settlement of disputes arising out of the *negotiation*, rather than the *interpretation*, of labor contracts.

The typical situation is the struggle between the company and the union when, following collective bargaining, they are unable to achieve agreement on such important issues as wages or working conditions. Mediation and conciliation have failed to induce an agreement and a strike or lockout appears imminent. When arbitration is required in such cases, the parties are compelled to submit their differences to some agency established by the government. In effect, that agency determines the contractual terms which will be binding on the parties. Consequently, when we speak of "compulsory arbitration" herein, we shall confine the scope of that term to the enforced settlement of disputes resulting in what might be called "compulsory contracts."

There is a popular song which proclaims that its author was "born in Kansas and was bred in Kansas." This description might well be applied to compulsory arbitration in the United States. If we may by-pass the Adamson Law of 1916, which, by compulsion, settled a railroad dispute by establishing the eight-hour day, we may acknowledge that so far as American experience goes, compulsory arbitration was born and bred in Kansas. Like many other prominent births in recorded history, moreover, this blessed or cursed event—depending on your viewpoint—was preceded by severe labor pains.

It has been estimated that during the period 1915 through 1919, approximately 700 strikes afflicted the Kansas coal mines. A serious shortage of coal resulted and the state, proceeding under its anti-trust laws, appointed a receiver for the mines and proceeded to operate them under National Guard protection. The U. S. Army also stationed troops in the area of disturbance. Against this backdrop

the Kansas legislature, in special session in 1920, adopted its compulsory arbitration law over the vigorous opposition of organized labor. This statute established the Court of Industrial Relations composed of three "judges" with jurisdiction over certain industries deemed to affect the public interest. It expressly covered the manufacture and transportation of food and food products and wearing apparel and the mining or production of fuel as well as the services of public utilities and common carriers. The court, which was essentially an administrative agency, was empowered to settle all controversies involving such industries and to seize and operate them during emergencies. Strikes, boycotts, picketing and intimidation were made unlawful.

The court promptly proceeded to investigate the coal mining industry. Certain officials of the UMW were summoned as witnesses, ignored the summons, were cited for contempt and were sentenced to jail. A strike was thereupon called despite the anti-strike provisions of the law. An injunction was obtained, was likewise disregarded and a jail sentence of one year imposed for the second contempt. Both contempt sentences were appealed and were sustained by the U. S. Supreme Court in 1922 without passing upon the constitutionality of the legislation.

The following year, however, the question of constitutionality was presented squarely and decided in Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 US 522, 67 L ed 1103, 43 S Ct 630 (1923); (see also 267 US 552, 69 L ed 785, 45 S Ct 441 (1925)), the court holding that the food industry was not a "business clothed with a public interest" so as to justify wage determinations as a permissible restriction on freedom of contract under the due process clause. It is confidently predicted that if the Wolff Packing case should be urged as a precedent today to invalidate compulsory arbitration of disputes involving businesses other than utilities, it will be relegated to that special chamber in the judicial morgue reserved for such illustrious corpses as Adair v. United States, Coppage v. Kansas, and Adkins v. Children's Hospital.

History records that the Court of Industrial Relations expired for all practical purposes even before the Wolff Packing decision. It atrophied from general indifference and was abolished officially in 1925 even though the statute still remains on the books, bloody and not unbowed. Thus, the boisterous offspring from Kansas, after a painful birth and a robust and vigorous infancy, became an unwanted and unclaimed waif.

Compulsory arbitration, born in the aftermath of World War I and buried several years later,

was resurrected with the advent of World War II when the National War Labor Board operated in effect as a compulsory arbitration agency. This experience must not be confused, however, with the type of compulsory arbitration legislation we are discussing here. The board included representatives of labor, management and the public and was organized as a patriotic contribution to the war effort. Having served the purposes of its creation, it was dissolved by executive order on January 3, 1946.

Shortly after the cessation of hostilities the pent-up demands of labor unions for increased wages and improved working conditions led to a large number of strikes, some of which involved public utilities. When a utility like an electric, gas, water or sewage company stops operating, there is not only inconvenience to patrons but also a definite and immediate hazard to health and life. It is not difficult to perceive why a large body of the public firmly believes that work stoppages in such basic utilities should not be tolerated.

Under the terrific pressure engendered by public indignation, Florida, Indiana, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania, Virginia, and Wisconsin, in 1947 enacted legislation providing for compulsory arbitration, seizure, or both in public utility labor disputes. These states, together with North Dakota (which had enacted a law in 1941) and Kansas comprised a total of twelve states in which such laws were in effect.

The New Jersey Court of Appeals in 1949 invalidated the law of that state on the ground that it did not prescribe adequate standards to guide the arbitrators and consequently the statute unlawfully delegated legislative powers. This defect was later cured by amendment. The Michigan law was likewise invalidated by the Michigan Supreme Court in 1948, on the grounds that it required the appointment of a circuit judge as chairman of a board of arbitration in contravention of the division-of-powers provisions of the state constitution and that it failed to prescribe adequate standards for the exercise of the delegated powers. The Michigan legislature later junked compulsory arbitration and substituted fact finding in its stead.

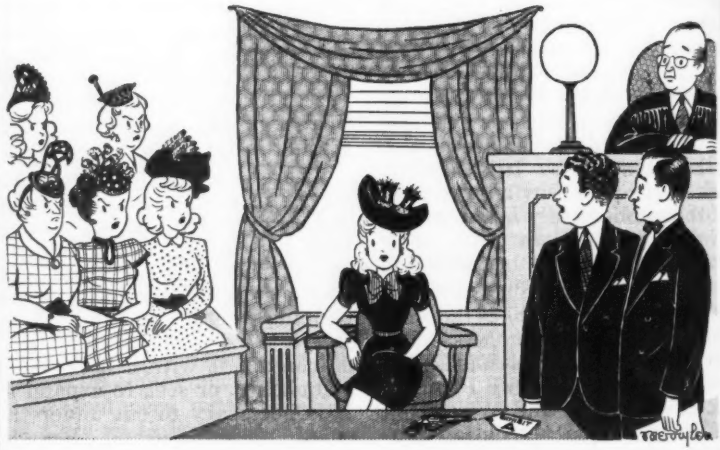
There is a wealth of literature on the pros and cons of compulsory arbitration. It is desirable that we survey the beachhead established by the advocates of compulsory arbitration and determine whether, in the national interest, we ought to liquidate it or contain it within its present boundaries, or seek to expand it. It is necessary to cut under the emotional surface and view the problem objectively.

Let us inquire: "Who wants this thing called compulsory arbitration and why?" Organized

labor definitely does not want it. I also believe the overwhelming sentiment of management is opposed to it. The real zeal for such legislation comes from a large and influential segment of the public which contends that the community is so dependent upon essential utility services for its very existence that work stoppages affecting such services simply cannot be tolerated. They assert that where the health and safety of the public are so directly affected, the well-being of the public must be paramount and the economic interests of the warring parties must be subordinated.

They argue that compulsory arbitration is entirely consistent with democratic principles since the people in the exercise of their rights as citizens voluntarily establish this process through their elected representatives. They answer the averment of the Kansas failure with the counterclaim that the Court of Industrial Relations was riddled with politics—as if this condition is the exclusive plague of the Sunflower State!

We must acknowledge that the proponents of compulsory arbitration make out a prima facie case. When we dissect the arguments however, and cut through



"We'll never convict her of the murder charge. I understand her husband made fun of her new hat."

the tissues of emotionalism, we find a hard core of real sense which calls for pause and serious reflection. The national policy in labor relations has been to encourage collective bargaining. Experience indicates that when the disputants know in advance that there will be an arbitration, both sides lose the will and incentive to make those final concessions which are so important in achieving agreement. Even where a statute prescribes adequate standards, they generally are not mutually acceptable and the ultimate adjudication appears unreasonable in the eyes of the disappointed party. There is less enthusiasm to abide by an agreement foisted on the parties than by the terms of a contract voluntarily executed after collective bargaining. This reluctance is aggravated by the strong conviction of the parties that their freedom of contract has been impaired. The union sulks at the deprivation of its most effective weapon—the right to strike.

Lowell once wrote that "One thorn of experience is worth a whole wilderness of learning." We have already noted from the thorny Kansas experience that one does not stop strikes by merely enacting a law prohibiting them. History records other thorns of experience which dampen one's ardor for compulsory arbitration. The modern renaissance of this process was in New Zealand in 1894. It was applied there with notable irregularity and was abandoned on occasion. In 1905, Australia enacted the Commonwealth Conciliation and Arbitration Act, which has experienced a checkered career. Australia has an economy much less complex than that of this country and the problems of administering and enforcing compulsory arbitration there should be much less formidable than the difficulties encountered here. Yet statistics indicate that its strike rate exceeds that of the United States! Denmark, too, established an extensive system of compulsory arbitration in 1936, but repealed it the following year. Norway and Sweden have employed compulsory arbitration to meet specific situations but have shied away from a general law adopting this principle.

Thus, we must conclude that actual experience with compulsory arbitration has not fulfilled the glowing predictions of its most insistent advocates.

I believe that compulsory arbitration has gone far enough for the time being. We should observe its operations carefully in those states which have adopted it and compare the results with conditions in those jurisdictions which have not yet entered the dubious fold. We should resist any effort to expand the coverage of such legislation to industries where a work stoppage would not directly and promptly affect public health and safety

even though such industries may also be classified technically as "public utilities."

If you examine them you will note that several of the state statutes include transportation within their orbit. There is a vast difference between a water company, for example, and a bus operator. A water company work stoppage would cause an immediate and direct threat to health and safety, and the community has no substitute available. On the other hand, a suspension of bus service does not directly imperil public health and safety and there are several alternatives available to the patrons of the "struck" company.

We must realize, moreover, that compulsory arbitration of rates of pay and those expensive "fringes on top" inevitably affect the price of the commodity or service sold by the company. Where a utility enjoys a monopoly, there is less likelihood of serious prejudice than in the case of a motor carrier which competes not only with other carriers performing the same type of service but also with other modes of transportation, including the privately-owned vehicle. These are service industries, and wages and salaries comprise approximately half of their operating expenses. One unrealistic award could eliminate the company from the field of its enterprise to the detriment of the company, its employees, and the public. It would seem much better from the standpoint of all concerned to endure a strike of average duration rather than force a settlement which would result in abandonment of service.

While we are testing compulsory arbitration in the crucible of experience within its present limits, we should try to perfect better techniques consistent with the policy of free collective bargaining. The method of fact finding, has, by no means, been given a fair and adequate trial. When properly and fairly applied, it can bring to bear the very strong pressure of public opinion for a voluntary settlement. We should intensify our efforts to halt work stoppages through better understanding between employer and employee, more effective conciliation, mediation and fact finding before we gamble too heavily on compulsory arbitration.

If these voluntary methods work, we shall not need the dangerous weapon of compulsory arbitration. There will then be no necessity to enforce, by legislative shotgun, a wedding which is distasteful to both the bride and groom. If the voluntary techniques do not work after a thorough and fair trial, we shall then face the dilemma of the marriage or the gun. My point simply is that we ought to give the suitors who are sold on the efficacy of free collective bargaining more time and opportunity before we pull the trigger.

A Time Study for Fixing Fees

By JACOB V. SCHAETZEL
OF THE DENVER, COLORADO BAR

Condensed from Dicta, March, 1950

AT THE beginning of this year, I examined the calendar and then made a few computations that proved very interesting in arriving at one of the bases for fixing attorneys' fees.

There are 53 Sundays, 52 Saturdays, and 10 holidays, or 115 days in which we do no work excepting possibly Saturdays when some of us do get to the office. Even with Saturday counted as part of a day, we lose enough time on vacations and by sickness to make up for that difference.

There will be 365 days in the 1950 period and if we deduct 115 non-working days, we will have 250 working days left. If we figure that we will put in 7 hours each day as chargeable time, we will have 1750 hours for which we can make a charge. From my own experience, this would seem rather liberal because I doubt if we can really charge for more than 6 hours a day. The rest of the day is generally taken up with various consultations, charity work, and other types of work for which no charge is made. It now becomes a rather simple matter to determine how much per hour we should charge as a basic minimum if we are going to earn what we think we should. For example, if we want to earn $600 a month or $7,200 a year, before state and federal taxes are taken out, we must divide the hours of time that we have (1750) into the $7,200 which gives us $4.11 per hour. This totals $28.77 per day. Then let us say that our tax is 20%. That now makes $1,440 for federal and state taxes or approximately $1.00 per hour more than the previous figure of $4.11.

Now, add your overhead. This consists of rent, stenographers, telephone, stamps, stationery, supplies, etc.; I doubt if any of us are getting through with less than $292 a month or $3,504 per year. Now, 1750 working hours into $3,504 makes roughly $2 per hour additional charge that must be made. One can readily see that the charge should be $7.11 per hour or approximately $50.00 per day.

If you want to earn $12,000 a year and still figure your overhead at $3,500 (which I don't believe is possible) one must then charge $8.85 per hour with-

out allowing for taxes. This amounts to $61.95 per day. There is only one way to increase earnings and that is by working overtime — Sundays, Saturdays, and nights. This is what the lawyers have been doing for a good many years to meet their normal and necessary financial requirements.

In figuring this method, I recognize the fact that some cases will produce more than others while with other cases we can't even charge the minimum overhead, standing the loss ourselves. I like to think that every piece of law work that comes into the office should be able to pay its own way.

We now have legal aid societies in most cities, and lawyers should not hesitate to send their indigent clients to the legal aid office where one is available. We all should use this agency much more than we do, thus having additional time to devote to our paying cases.

Practically everything we buy has doubled in price but legal fees have only gone up about 1/3 on an average. This makes it very necessary for lawyers to become conscious of the value of their own time. Also, our judges who often fix fees for lawyers should realize that we are meeting an overhead, state and federal taxes, and trying to give our children the same education that those in the mercantile and other fields are giving their children. Meeting these demands has not been easy for the past ten years and if all of us would take a good fair look at it we would realize that we should become much more efficient than we have been in the past. If all the labor saving equipment that we are capable of installing were put in our offices, precious and costly time would be saved. As a result, we could do more legal work without increasing fees.

The writer realizes that the amount of time a lawyer spends on a case is only one element of many that should be taken into consideration in arriving at the final fee to be charged, but when an attorney has kept an accurate record of what he did and the time it took and presents this to his client, who can afford to pay a reasonable fee, I feel certain that the client will gladly pay it and will generally exclaim, "I had no idea it took that much time and I can readily see that you have earned your fee and here is my check in payment."

John Hemphill—Chief Justice of Texas

By HON. JAMES P. HART
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Condensed from Southwestern Law Journal, Fall, 1949

JOHN HEMPHILL has sometimes been compared to John Marshall. Their work was similar, in that each was called on to lay the foundations of an enduring jurisprudence for a newly-born government.

Hemphill and his associates faced unusual perplexities. Until 1840, all rights in Texas of a civil nature, and thereafter many important ones, were determined by the civil law of Spain or Mexico. Even in the fields where the common law of England was adopted, modifications were made by statute that required interpretation in application. Nor was the environment one which we would regard as conducive to the best judicial work. Living conditions were primitive; there was constant danger from Indian raids and Mexican invasions. Access to texts and decisions of other courts was limited, even in situations where helpful precedents might be expected to exist. In such an atmosphere and under such handicaps, it is truly remarkable that Hemphill and his colleagues turned out opinions whose general excellence has probably never been equalled by any other court in Texas history.

Hemphill did not come to Texas until 1838, about two years after Texas had won her independence. Like many other leaders in Texas in that day, Hemphill was a native of South Carolina, where he was born in 1803. He was educated in the public schools and at Jefferson College, in Pennsylvania. After teaching school for several years, he studied law in the office of D. J. McCord of Columbia. In 1829 he was admitted to practice in the courts of common pleas and in 1831 he was admitted to practice in the equity courts. In 1836, Hemphill participated in a military expedition against the Seminoles in Florida, where he contracted malaria, which apparently permanently impaired his health.

When he came to Texas, Hemphill settled at Washington on the Brazos. Realizing the necessity of learning the Spanish language so as to understand the Texas law, he is said to have gone into retirement until he mastered Spanish. He practiced

law at Washington until some date prior to May 3, 1839, and thereafter practiced at Bastrop until January 20, 1840, when he was elected district judge. He had previously declined an offer by President Lamar to appoint him Secretary of the Treasury.

On December 5, 1840, Chief Justice Rusk resigned and John Hemphill was elected to succeed him.

A number of Hemphill's reported opinions as Chief Justice of the Republic relate to questions of procedure, which naturally would be more unsettled at the beginning of the court's history than thereafter. Hemphill took occasion to remind the bar that "our system of proceedings in civil suits differs from that known in England and adopted in most of the states of the United States." In another case he referred to the "technical distinctions of the system of pleading under the common law" and observed that, "under the simplicity of the system adopted by the statutes of this republic, they must surely be unknown."

Hemphill was not left to perform his judicial labors undisturbed. In 1842, General Vasquez invaded Texas from Mexico and captured San Antonio. The threat to Austin caused its virtual abandonment as the capital, Congress removing its sessions to Washington on the Brazos. The Court held no sessions from the end of the January term, 1842, to the beginning of the June term, 1843. Hemphill joined General Somervell's expedition to the Rio Grande, as Adjutant General. However, the expedition soon was abandoned, and Hemphill and most of the others returned to their homes. In the June term, 1843, we again find him sitting as Chief Justice.

In addition to the other handicaps under which he worked, Hemphill's pay for his judicial work was highly uncertain. In the Texas State Archives, in Hemphill's handwriting, is a memorial to the Congress, requesting most respectfully that he be paid his salary as district judge, from March 20 to December 5, 1840, in the sum of $2125.00, and as Chief Justice from December 5, 1840, to January 3, 1842, in the sum of $3250.00. To show his urgent need, Hemphill pointed out that he owed "seven hundred fifty Dollars in par funds," all of which debt having been contracted "since Judicial Office was conferred upon me." Later he and Judge R. E. B. Baylor joined in a memorial in which they respectfully represented to the Congress that "they have exhausted their private resources and have to some extent involved themselves in pecuniary liabilities to sustain the Judicial Department of the Government," and that "under such circumstances it will be impossible for the undersigned longer to hold the Courts of the Country

unless Congress should adopt some measures for their relief."

While Hemphill was proposed as a candidate for President in 1843 and 1844, he declined to run because of ill health. He was an advocate of annexation, and when the convention was convened in Austin on July 4, 1845, to draft the ordinance of annexation and the constitution for the state, Hemphill, as a delegate from Washington County, was recognized as one of the leaders. He was appointed chairman of the Judiciary Committee, which was charged with the responsibility of drawing the judiciary section of the constitution.

Hemphill's draft of the judiciary section of the constitution was presented to the convention on July 11, 1845. It provided for a three-judge Supreme Court, to be appointed by the Governor with the consent of the Senate. The main features of this draft were adopted with little debate. Upon some subjects, however, disagreement arose. One of these was a suggested amendment establishing separate chancery courts. Upon this matter, Hemphill expressed himself as follows, in a committee report dated August 8, 1845: "That the present system of administering justice in the same court, according to the principles of both law and equity, or either, as the circumstances of the controversy may demand, has been long established, is well understood, and possesses too many advantages to be lightly abandoned."

While Hemphill was thoroughly convinced of the wisdom of applying law and equity in the same court, he unsuccessfully opposed the proposal that jury trials be granted in equity cases. Thomas Jefferson Rusk, the chairman of the convention, took a view contrary to Hemphill's, and his views prevailed, the convention adopting a provision for jury trials in equity cases as well as those at law.

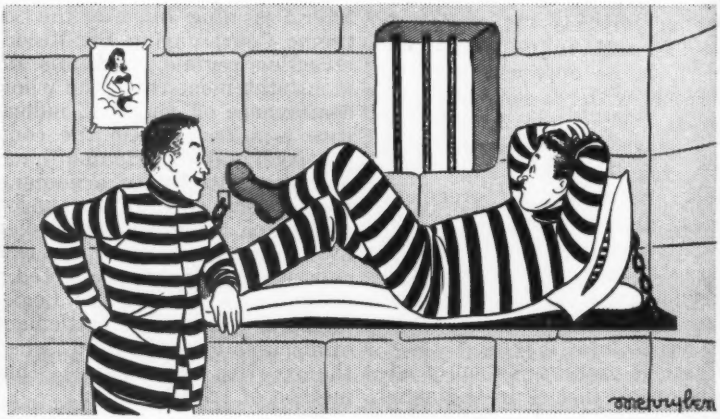
Another interesting debate occurred in connection with the section providing for the adjudication of disputes by arbitrators. It was in the course of this debate that Lemuel D. Evans, later Presiding Judge of the Supreme Court during the Reconstruction regime, made his famous statement that "the whole contrivance of courts of judicature is a fraud upon the community." While Hemphill did not agree with Evans' argument, he did agree with his conclusion that much could be accomplished by arbitration. Following this debate the convention adopted a provision permitting the Legislature to provide for settlement of disputes by arbitration "when the parties shall elect that method of trial."

Hemphill also took an important part in the debate upon the provisions of the proposed constitution relating to the property rights of married persons.

After the admission of Texas to the Union, Hemphill was appointed on March 2, 1846, Chief Justice of the State Supreme Court, and served in that office for over eleven years, from 1846 until he was elected to the United States Senate in 1857.

In form, Hemphill's opinions are dignified, direct, learned, closely reasoned, and carefully written. Perhaps their most striking feature to the present-day reader is his partiality to the civil law as distinguished from the common law. For example, in Giddens v. Byers' Heirs, 12 Tex 75, 83 (1854), Hemphill referred to what he considered a hypertechnical distinction as having "no effect anywhere except in the hard, naked regions of the Common Law." Referring to the common law procedure, he observed in Neyland v. Neyland, 19 Tex 423, 429 (1857), that "at Common Law the plaintiff and defendant are placed on the same footing of knowledge, or rather ignorance, by the pleadings." On the other hand, he spoke of the "strict equity which characterizes the Spanish jurisprudence," Saunders v. Eilson, 19 Tex 194, 199 (1857).

Hemphill emphasized the abandonment of the common law pleadings in civil cases. On the other hand, he deplored the



"I'll have the last laugh on that judge — I won't live long enough to serve the sentence he gave me!"

retention of the common law rules of procedure in criminal cases. In State v. Odum, 11 Tex 12, 13 (1853), referring to the claim that the indictment did not sufficiently enable the court or the defendant to understand the offense charged, Hemphill said: "To impute such incapacity to a Court, would be highly indecorous; and it could not exist in the defendant, without an imbecility which would render him, legally, incapable of crime."

In matters of the property rights of married persons, it is obvious that Hemphill was proud of the rights accorded under Texas law to the wife. On the other hand, he was scathing in his comments on the rights of married women under the common law.

Hemphill's admiration for the civil law apparently grew out of a close study of it. His familiarity with the Spanish and Mexican sources is evident in a variety of situations. He frequently quoted Spanish texts at length, when they were available, and expressed regret that his researches were limited by the lack of a complete library.

Hemphill and his associates were generally in accord. Only occasionally did Hemphill write special concurring opinions, and a search of the reports has disclosed no case in which he dissented from the court's judgment.

In 1857, the matter of the election of a United States Senator in the place of Sam Houston came up before the Legislature. John Hemphill was proposed as one of the candidates. It is difficult to understand why Hemphill would have wanted to exchange his judicial career, for which he was so well suited, for the rough-and-tumble life of the Senate, except that he felt that duty compelled him to do so. At any rate, he was elected over a field of several prominent opponents on November 9, 1857.

We can only conjecture as to whether Hemphill was happy in his work in the United States Senate. It certainly was not a happy time for the South, which was faced with the choice of Northern domination or secession. Most of Hemphill's time seems to have been taken up with routine matters. However, when it became apparent that the Southern states, including Texas, would secede, Hemphill prepared and delivered in the Senate on January 28, 1861, a learned and eloquent defense on secession, and particularly of Texas's part in it. His speech reads in many parts like one of his opinions, being well supported by references to and quotations from historical authorities, such as congressional journals and *The Federalist*, and is undoubtedly one of the best reasoned expositions of the subject.

Hemphill left Washington soon after delivering this speech. He was offered but refused ap-

pointment as the Confederate States district judge for Texas, but accepted election as one of the delegates to the Confederate Provisional Congress which met at Montgomery in 1861, and was a member of the Congress which met at Richmond later in the same year. He was a candidate for Confederate States Senator in that year, but was defeated by W. S. Oldham. However, he was still serving as a member of the Confederate Congress at Richmond when he died of pneumonia on January 4, 1862. His body was brought back to Austin, where he was buried on a wet and cold day, on February 10, 1862, in the State Cemetery. It is said that in spite of the weather "almost the whole population turned out to do honor to the distinguished dead."

Hemphill's greatness as a judge seems to have been universally recognized by the profession. In 1869, George W. Paschal, who had been on the opposite side from Hemphill on the question of secession, wrote that Hemphill's opinions "evince that of all our jurists he best understood the sources of our law." In 1883, ex-Chief Justice Roberts, who had served with Hemphill on the Supreme Court, in presenting a portrait of Hemphill to the Supreme Court, gave a masterly summary of Hemphill's work. Of Hemphill personally he said:

"He was one of the few judges that have been on the supreme bench who gave very especial attention to the literary excellence of his written opinions. In consequence of this, and on account of the great care and deliberation given to his subjects, he did not deliver as many opinions as either of his associates, he not having delivered more than about five hundred in the eighteen years during which he was chief justice, from 1841 to 1858.

"He presided in court with a rather austere dignity, and gave to those addressing the court a respectful and silent attention, rarely ever asking a question of the counsel in the case being presented. When he spoke at all on the bench, his words were few and his manner positive.

"In his intercourse with the members of the bar he preserved a reserved dignity, that, though hardly repulsive, did not invite familiarity; yet he was a man of kindly and friendly disposition generally, with remarkable uniformity in his manners and general hearing.

". . . His presence always commanded the respect due to his exalted position as chief justice."

From these contemporary estimates of Hemphill, as well as from his opinions, we can only draw the conclusion that he was truly a great judge.

Rights, Duties and Liabilities under a Liquor License

by CARL B. EVERBERG
Assistant Professor of Business Law, Boston University

SOME time in the neighborhood of 1880 a certain client in a town in Pennsylvania wrote his lawyer that he had just received a license from the Court of General Quarter Sessions for the County of Crawford to sell Spirituous, Brewed or Malt Liquors; he wanted an opinion as to what he could do under protection of his license and what not to do. Substantial portions of the lawyer's opinion are set forth below.

"After you have paid the price of your license—which our law generously fixes at $50—you may then proceed to decorate your 'bar-room' in the most attractive and alluring style calculated to catch the eye and please the fancy of those who pass your door. Beautiful pictures of the female form, draped as was Egypt's dark-eyed queen when, unrolled from her silken web, she stood before Caesar and conquered him, may glow from gilded frame and fresco in your 'place of business.' . . . Luxurious chairs and cushioned divans may court the wearied forms of the 'traveling public.' Marble-top tables covered with the illustrated literature of the day may throng the sides of your room; beautiful carpets may cover your floor; music may enchant the ears of your customers, and red-lipped sirens from the courts of Bacchus and Gambrinus may attend upon those you allure into your 'hall of enchantment' and by their wiles banish from the memory of youth the recollections of a mother's purity and prayers. . . . But here let me warn you that while the law permits you to entice your customers with attractive amusements, and with great freedom to exercise your taste in fitting up your 'place of business' for the benefit of your traffic, yet you must not allow gambling within your precincts," etc. [Here follow warnings about selling to minors and persons of known intemperate habits and permitting drunkenness and disorder.] You dare not turn the customer into the street in the darkness and storm of a winter night, for he might perish with the cold. It is not safe to take him home to his wife and children, for in his drunken frenzy he might murder them. What are you to do?

My friend, I do not know. It is more a question of fact than law. . . . But how you can avoid the rock of Scylla on the one side and escape the whirlpool of Charybdis on the other side is beyond my comprehension. . . .

"My legal opinion is ended; but in conclusion let me suggest to you a matter of policy. As you may wish to preserve your good character for future use in obtaining other licenses you had better join a church, or at least have your wife do so. You can well afford to pay liberally to support the ministry. The profits of your bar for a few weeks will undoubtedly be more than the average yearly salary of ministers; and besides, as it is the business of these reverend gentlemen to convert sinners, to take the drunkards from the filth of inebriety and to convert them into good, sober, industrious Christian men; and as your business will give them so much of the raw material to operate upon and they will have to labor so hard to work up the material you will furnish them, it is but right that you should pay more than the ordinary church member. . . .

"My esteemed friend, I fear my legal opinion may not be what you desire, or even what it should be, therefore will make no charge for it."

The author of the opinion published it in a book written by

himself, Leaves From the Diary of an Old Lawyer, A. B. Richmond, Member of the Pennsylvania Bar, Meadville Publishing House (1883). A zealot for temperance, he wrote in this book that his experience at the bar had satisfied him that intemperance was the cause of nearly all the crime that is committed in the country. After 30 years at the bar he said he had been engaged in 4000 criminal cases —he was satisfied that 3000 of them originated from drunkenness alone and he believed, he said, that a great proportion of the remainder could be traced directly or indirectly to "that crime."

But he was always glad to get off a prisoner whom he was defending on one of these crimes. There was always a chance of reforming such a one if you could get him off. Once he got a verdict of "Not guilty" because of a slight misdescription in the indictment of a counterfeit bill alleged to have been passed by his client. Imagine the attorney's joy when he met his erstwhile client 14 years later in Washington, D. C., a member of Congress. Would that ever have been possible if the client had been sent to prison?

He pointed out in his book that sewers are examined; cesspools "where lie hidden the seeds of pestilence" are removed; we arrest the flight of epidemics—but, "in our midst are hundreds and thousands of plague-infested spots, licensed and protected by law, from whence are scattered the germs of disease and death more terrible and certain in their effects than all the plagues that have swept over the earth, decimating the people."

Believe I'll have a glass of water, thank you.

We Wish There Were

The trouble wilth our financial problems is that there aren't any answers in the back of the book.—Seng Fellowship News, Seng Co.

So That's What It Is

Of course money doesn't grow on trees. The Bible told us long ago it's a root.—Wall St. Journal.

With Age Comes Wisdom

The older the man the more slowly he reads a contract.—Geo. B. Gross, Herald. (Plentywood, Montana)

Roman Law and Its Influence on Western Civilization

by HESSEL E. YNTEMA
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THERE have been, in the Western World, two dominant legal systems, the Roman and the English. Both are functions of empire, the products of peoples gifted to rule. In the legal systems of these two peoples, accordingly appear significant analogies.

Justinian's project of reforming and restating the law was initiated in 527, and the codification was completed in 534. It included the Institutes, the Digest, the Code, and the Novels, or constitutions, enacted after 534.

The central and most significant part of Justinian's codification is the Digest, authorized in 530 by a constitution empowering Tribonian, and a commission selected to assist him, with full authority to revise and cut down the texts of the writings of the ancient jurists and with instructions to choose what the commissioners thought best, eliminating all that was superfluous, obsolete, contradictory, repetitious, or already contained in the Code (except as clarity required). The Digest was supplemented by the Institutes, a textbook for students which was in effect a revised official edition of the Institutes of Gaius, including excerpts from other sources. There is sufficient evidence that this process involved substantial editing of the originals.

Basically, the Roman state from the outset included three elements, the citizens, the magistrates whom they elected in the comitia, and the senate appointed by the consuls. Although the basic laws were enacted by the comitia, the voting was always by groups, not individuals, and the assembly could meet only when summoned by the appropriate magistrate and could only vote, without discussion, upon the business laid before it by the magistrate who summoned it.

Subject to the legislation laid down by the burgesses, the Romans vested in their principal magistrates a general *imperium*, which included the power to seize and condemn individual citizens, to command the military, to administer justice, and to convene the assembly. The limitations upon this essentially absolute conception of authority

were practical rather than constitutional in the modern sense. For example, the brevity of the term of office of the two consuls, and their power to veto the acts of each other, the creation of other offices, such as the tribunate, and the political necessity of consulting the senate provided limitations and control. Moreover, in capital cases the condemned citizen had the right of *provocatio* to the assembly, and from the beginning the sphere of religion was separate from the secular government.

A sharp line also was early drawn between customary morals and law. The Roman demand for liberty required wide areas free from legal rules because of the number and effectiveness of nonlegal restrictions. This may be illustrated by the character of the Roman family law. Theoretically, the power of the *paterfamilias*, like that of the magistrate general and absolute, was from the first restrained in practice by the family council to which the head of the family was by custom

"I didn't think the judge really meant it when he said he would jail everyone for contempt of court."

required to resort before making an important decision regarding a member of the family.

The books tell us that the methods by which legal rules might become effective in Rome were: first, positive enactments, the *leges* voted by the popular assemblies during the Republic, supplemented by *senatus consulta* and imperial constitutions in various forms during the Empire; second, edicts of the magistrates; and, third, interpretations, with which are to be included the so-called *responsa* or opinions of the jurisconsults. Custom is also mentioned but as of distinctly minor importance.

Of these, during the formative republican period, the comitial enactments were few and brief. Until the energies of the jurisconsults were definitely and anonymously absorbed into the bureaucracy of the later Empire, the Romans apparently were averse to formal legislation as a means of elaborating the law, although the *lex* was occasionally employed to abolish social evils, to enact specific rules such as the state alone could prescribe, or to make administrative provisions. The main fields of civil law, contract, property, pledge, succession, family relations, were relatively untouched.

On the other hand, the edicts of the magistrates, and especially of the urban and peregrine praetors, proved of the greatest importance in the development of the law. It was by this means that the *ius honorarium*, the system of remedies supplementing the earlier *ius civile* was created.

In the Roman system of civil procedure, which was in classical times a contest of the parties, supervised by the magistrate, rather than an officially directed inquisition, a distinction was from the beginning drawn between the pleadings leading to the formulations of the issue, and the actual trial of the case. In the formalistic period of actions based upon the Twelve Tables, it was necessary for the parties to recite their claims or defenses in literally exact terms, the formulae for which were for a time at least the exclusive property of the college of pontiffs. In the formulary procedure, by which the ancient actions were superseded and which was employed throughout the classical period, the proceedings *in iure* involved the issuance of a formula by the praetor, instructing the *iudex* to adjudge as the facts should appear in favor of the plaintiff or the defendant on the conditions stated in the formula and approved by the magistrate as representing the law.

On the other hand, the actual trial took place before a *iudex*, usually agreed to by the parties, who was selected from a panel of leading citizens-laymen.

This procedure had the result of placing the administration of

justice in the hands of magistrates, typically political figures, and the trials themselves under individuals who might or might not be learned in the law. Both the magistrate and the *iudex*, as well as the parties themselves, required the advice of experts who by their studies had acquired authority in law. The consequence was that the law was chiefly developed by jurisconsults whose actual position was comparable to that of the judges in the English courts, with the advantages that they did not have to justify their opinions immediately to disputatious litigants and that, relieved of the tedium of presiding over the trials themselves, they were able to concentrate their attention on the specific problems of justice. In consequence, although Rome did not develop a professional bar such as that of England and other European countries, the interpretation and application of law was from the beginning specialized in the hands of a relatively limited group of experts, who were happily enabled by the very scheme of the administration of justice to deal with the practical problems of law on an objective, scientific basis.

Roman law was submerged in the Eastern Empire with the fall of Constantinople in the Fifteenth Century, but maintained a precarious, diluted, subordinate in the Roman provinces in the West until the Eleventh Century.

The real resurrection of Roman Law occurred there when its study was revived in the universities of northern Italy and thereafter in other parts of Europe. As the pupils of the glossators and the long procession of their academic successors, who taught them the law of Rome as the universal law, were increasingly taken into official positions in the emerging national governments, they inevitably brought to bear upon the duties of their offices as administrators, judges, and advocates the conceptions of the Roman jurists in which they had been schooled. By this means particularly, the system created by the Roman jurisconsults was perpetuated, centuries after the dissolution of the Empire, in the medieval and modern civil law.

This is not to suggest that the so-called reception of the Roman law in Western Europe during the Renaissance simply or completely revived the principles embodied in the *Corpus Iuris Civilis*. Even in countries where formal enactments recognized Justinian's codification as the source of a subsidiary "common law," its assimilation was partial and biased; the classical doctrines were inevitably construed, perverted, or ignored in the light of current necessities and in varying measure amalgamated with indigenous institutions and conceptions.

It should not be supposed that formal adoption of the Roman law as a *ius commune* was indispensable to reception of the Roman ideas. Even in the area of the Anglo-American common law, where the law of Justinian has never been recognized as an authoritative source of law (except in jurisdictions such as Scotland, Quebec, and Louisiana), it is noteworthy that the Roman conceptions have had pervasive, if unacknowledged, influence; indeed, there were two creative epochs in the development of English law when the civil law was all but formally received.

In conclusion, it may be said that the significance of Roman law in Western civilization, understood in a broad sense, implies first, the development of a fundamental body of legal doctrine, which, with the feudal law, the canon law, and the law merchant, has been a central common element in the individual legal systems of much of Continental Europe, and its colonies; second, the even wider dissemination of a basic stock of systematic legal conceptions and principles not merely in the civil law systems but also in the Anglo-American common law; third, the further extension of this stock of conceptions by virtue of its acceptance in the system of international law developed by Hugo Grotius and his successors; and fourth, the even more important fact that the language of Roman law has become a *lingua franca* of universal jurisprudence, as evolved in the dusty tomes of medieval civilians and canonists and their successors, the writers on natural law and legal philosophy and the more modern pandectists, whose works are the chief source of technical legal theory. The significance of Roman law in the modern world is thus historical.

Unsuccessful Operation

Patricia, aged seven, was watching her mother smooth cold cream over her face, and asked, "What's that for, Mother?"

Mother answered, "Why, this is to make me beautiful."

After the cold cream had been removed with tissues, Patricia sadly remarked, "Didn't work, did it?"

This Modern Surgery

On a trip in town, 7-year-old Janie took her new collie into a grocery store.

"That's a fine dog you have there, Janie," said the grocer. "If she has pups will you please save me one?"

"I'd love to," replied Janie, "but Lady won't have pups. She's already had her tonsils out."—*Country Gentleman.*

TAXES AND YOUR CLIENT

The Tax Side of Everyday Legal Problems

By BERNARD SPEISMAN of the New York Bar

Tax Attorney, The Lawyers Co-operative Publishing Co.
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Depreciation Allowed on Contributed Investment—Cautionary Note on Certain Leases—Basis in Case of Unreported Income

IT HAS become a fairly common practice to offer substantial subsidies to a corporation on condition that it establish a plant in a given community. The United States Supreme Court has just settled an important tax issue arising from such a transaction. Incidental implications of the decision, relating to certain kinds of leases and another frequently encountered problem, give it added interest.

According to the Supreme Court, a taxpayer receiving such a contribution from a community (or its residents) and then expending funds for the erection of a plant may consider the subsidy as a contribution to its capital. The subsidy thus becomes part of its own investment in the plant, subject to annual depreciation deductions (Brown Shoe Co. v. Commissioner (1950) — US —, 94 L ed —, 70 S Ct 820). A person need not be a stockholder to make a contribution to the capital of a corporation, the Court points out, citing Sec. 29.113 (a) (8)-1 of Income Tax Regulations 111.

The Circuit Court (CCA 8) had held to the contrary, relying on an earlier decision by the Supreme Court. In Detroit Edison Co. v. Commissioner (1943) 319 US 98, 87 L ed 1286, 63 S Ct 902, the Supreme Court had held that a public utility company was not entitled to depreciation allowances in respect of facilities which had been paid for by its customers. However, the facts control before the United States Supreme Court as before other tribunals (a circumstance frequently overlooked by the lower Courts in tax cases; cf. Helvering v. American Dental Co. (1943) 318 US 322, 87 L ed 785, 63 S Ct 785, and Commissioner v. Jacobson (1949) 336 US 28, 92 L ed 477, 69 S Ct 358, 7 ALR 2d 857; also Commissioner v. Court Holding Co. (1945) 324

US 331, 89 L ed 981, 65 S Ct 707, and United States v. Cumberland Public Service Co. (1950) 338 US 451, 94 L ed —, 70 S Ct 280). And in the Brown Shoe Case, the Supreme Court distinguishes the Detroit Edison Case on its facts, noting that in the latter, "The payments were to the customer the price of the service," and "it overtaxes imagination to regard the . . . customers who furnished these funds as makers, either of donations or contributions."

As for the implications of the decision:

1. It is elementary tax law that property received and reported as income in the amount of its fair market value takes such value as its cost basis, subject to depreciation allowances. Thus, when the Supreme Court denied a basis to the taxpayer in the Detroit Edison Case because the payments were the price of the service, it can only be because the taxpayer neglected to report the payments as income. As a matter of fact, the Court took special note of the taxpayer's neglect in this respect in the Detroit Edison Case. Its decision in the Brown Shoe Case, allowing a basis in respect of a contribution to capital, thus leaves as the sole ground of the decision in the Detroit Edison Case the fact that the taxpayer had not reported the customers' payments as income.

The significance of the situation is this: There has been a difference of opinion among the Circuit Courts as to whether a taxpayer may claim a basis for property received as compensation, etc. where the taxpayer has innocently omitted the receipt from income. The First and Second Circuits have allowed a basis in such case (Countway v. Commissioner (1942) 127 F2d 69; McCullough v. Commissioner (1946) 153 F2d 345). The Fifth Circuit has, however, denied a basis in this situation (Johnson v. Commissioner (1947) 162 F2d 844). The result in the Brown Shoe Case would seem to indicate that the Supreme Court sides with the Fifth Circuit on this issue. It is an important question because, taxes being somewhat complicated, taxpayers frequently neglect to report property received as income through misunderstanding of the applicable rule. (Cf. Sec. 3801, I. R. C.)

On the other hand, there is no reason to infer that the denial of basis would apply where there is no direct connection between the receipt of income and its expenditure for property. In the Detroit Edison Case, the customers made the payments specifically for the construction of facilities which were to serve them. Had they simply made payments for service which the utility company voluntarily used for unrelated facilities, it would have been in a better position to claim the proper basis, though

the income had not been reported.

2. The Brown Shoe Case allows depreciation deductions to a taxpayer who has made no investment. The technicalities of tax law are such that, in a related situation, a taxpayer who has made an investment may be denied the deduction for depreciation—unless proper care is exercised. A lease agreement may call for the lessee to erect an improvement. The lessor may agree to make a contribution to the cost in consideration of the rental and the fact the improvement will ultimately revert to it. In such case, the lessor should specifically provide in the contract that it is contributing directly to the cost of the building and not to the lessee. Otherwise the lessor may be denied annual depreciation allowances in respect of its investment in the property. Thus, in Commissioner v. Revere Land Co. (1948, CA3d) 169 F2d 469, cert den 335 US 853, 93 L ed 401, 69 S Ct 82, the *lessee* was allowed depreciation on account of the lessor's payment directly to it which was used for the improvement by agreement. In that case, the Court found that preferred stock had been issued to the lessor for its contribution. The Supreme Court's decision indicates that the same result would obtain if a contribution is made to the lessee, whether stock is issued therefor or not. (See also Reisinger v. Commissioner (1944, CA2d) 144 F2d 475).

Tax Pitfall in Taking Notes on the Sale of Property

THE RECEIPT of promissory notes in part or full payment for property may result in the loss of capital gain benefits in some situations unless proper precautions are taken.

A sells certain stock, which cost him $4,000 in 1948, for $12,000 in 1950, taking $10,000 of the selling price in personal notes of the purchaser payable 18 months from date. The notes have a fair market value when received equalling only 25% of their face amount, but the seller receives payment in full from the maker on the due date.

Under Sec. 111 of the Internal Revenue Code, profit realized on the sale must be reported as income to the extent of the fair market value of the obligations received. Thus, the seller must report the difference between the cost of his stock and the cash plus the fair market value of the note received ($500) as a long-term capital gain in 1950 (assuming he is not a dealer holding the shares for sale to customers in the ordinary course of his business).

What about the $10,000 received in payment of the note on

the due date? The previously unreported gain, or $7,500, must be reported as income when it is received. May it also be treated as long-term capital gain from the sale of the stock, only 50% of which need be taken into account for tax purposes?

According to the Tax Court, it may not be. The receipt is in payment of the note, not from the sale of the stock, and the income realized — $7,500 — is, therefore, taxable in full as ordinary income (A. B. Culbertson 14 T Ct No. 62).

Several remedies are available to avoid this inequitable result:

(1) Wherever possible, the note should be sold to a third person—in a bona fide transaction, of course. The seller then realizes a long-term capital gain on the sale if the note has been held longer than six months and the taxpayer does not hold such notes for sale to customers in the ordinary course of his trade or business (cf. Rockford Varnish Co. v. Commissioner (1947, F) 9 T Ct 171). The purchaser of the note will, of course, have ordinary income on the payment of the note, but the tax saving to the seller should ordinarily be sufficient to permit an attractive concession to the purchaser.

(2) Where the obligor on the note or bond is a corporation, it may be issued in registered form

"Is it true that this pen is guaranteed not for life,—but forever?"

or with coupons attached. In such case, gain on retirement is a capital gain (Sec. 117(f), I.R.C.). This method is desirable only where the obligation is worth substantially less than its face amount when received. If it is worth full value, the full amount is reportable when received. Should less than the full amount be received ultimately, the holder of the note would have a capital loss in any case.

(3) If the provisions relating to installment reporting (Sec. 44, I.R.C.) are availed of, any gain or loss on the payment of the obligations "shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received." If a capital asset held longer than 6 months is sold, payment of any obligations received would be long-term capital gain. The installment basis has the further virtue of deferring all gain represented by notes or other obligations irrespective of their fair market value. However, this method may only be used in respect of casual sales of personal property (noninventoried) for a price exceeding $1,000, and sales of real estate, provided in either case the "initial payment" (exclusive of notes and other obligations, but inclusive of all other payments made during the taxable year of sale) does not exceed 30% of the selling price.

(4) What if the taxpayer in the example mistakenly omitted the $500 from income of 1950? Would he then have to add the $500 to the $7,500 income reportable when the note is paid? In the Culbertson Case, the Tax Court holds the $500 would not have to be added, on the principle that income must be reported in the proper year and can't be taxed in any other year (Greene Motor Co. v. Commissioner (1945, F) 5 T Ct 314).

Like Father, Like Son?

Two teen-age boys went into a farmer's orchard to pick some apples. Suddenly, the farmer's wife spotted them and called out the window: "You boys, there! Stop picking those apples!" But the boys went right on.

"It's all right," one of them called. "I'm a minister's son."— *This Week.*

Too True

There seems to be a widespread idea among an ever-growing number of people that the reading of newspapers and magazines, the listening to radio commentators and the looking at television forums is supposed to take the place of thinking.—ERICH BRANDEIS, Capper's Weekly.

Yours... Absolutely Free! FEDERAL TAX ANALYSCOPE! Now...Federal Taxes Need No Longer Faze You! This Amazing New Booklet Shows You Why!

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DON'T BUY A TAX BOOK UNTIL YOU SEE THE 1951 ALEXANDER FEDERAL TAX HANDBOOK

When Bigotry Knocked on the White House Door

by WILLIAM J. MURDOCH, *Kalamazoo, Michigan*

TODAY'S commendable campaigns against racial and religious prejudices in our society bring to mind earlier days of intolerance in America when anti-Masonic forces attempted to elect a President of the United States.

That they failed, miserably, was not only a triumph of Freemasonry. More important, it was a crushing blow against malignant bigotry which, once it lurches up off all fours and is permitted to stalk abroad unchecked, becomes an insatiable monster of hate and destruction.

It happened back in the 1830's. Andrew Jackson had moved into the White House in 1829 and was running for re-election, opposed by Henry Clay.

Clay had many adherents. Among them was William Wirt, a distinguished attorney and an author of not inconsiderable success. He had served as attorney-general of the United States for 12 years before Andrew Jackson came along and appointed a new cabinet. Earlier, he had been one of the government's ace prosecutors of Aaron Burr.

At about this time, 1830, anti-Mason feeling developed among some of the misinformed and suspicious elements. Andrew Jackson was a Mason, and outspokenly proud of it. Thus he became the target of the first officially recognized "third party" in the history of the United States: the Anti-Masons. They needed a candidate, and they chose Wirt.

It was a rather queer selection. Wirt bore no grudge against Masons. In fact, he had joined the Masons many years earlier, and although his legal and literary pursuits finally demanded so much of his time that he simply lost touch with Masonic activity, he still respected the order.

But Wirt saw an advantage in the opportunity offered by the Anti-Masons. It fitted in nicely with the influence he wielded among the Whigs, who supported Clay. It was his plan to unite both parties—the Anti-Masons and Whigs—against his political enemy, Jackson.

He made his stand clear, however. In a letter of acceptance to the Anti-Masons he wrote that he considered anti-Masonry as a "fitter subject for farce than tragedy." In his politicking, too, he held the anti-Mason venom in check.

But the entire venture was a fiasco. Aside from establishing political convention procedure which is followed to this day, the Anti-Masons gained nothing. They would not back Clay: the Whigs would not desert Clay in favor of Wirt. The former attorney-general would have gladly withdrawn his own name, but could not at that critical moment turn his back on the party that had chosen him. Thus he entered the polls an unwilling candidate.

He made a sorry showing. He captured only 7 electoral votes. Clay won 49. Jackson was swept into another term on the crest of a 219-electoral vote landslide. The nation had resoundingly rejected the appeal to suspicion and mistrust and intolerance.

Trampled so ignobly, the Anti-Masons never regained the fortitude nor strength to rise again to such prominence. A few years later their few numbers were swallowed up in political mergers. Wirt, their candidate, was not alive to witness their final retreat from the scene. He died just two years after his defeat at the polls.

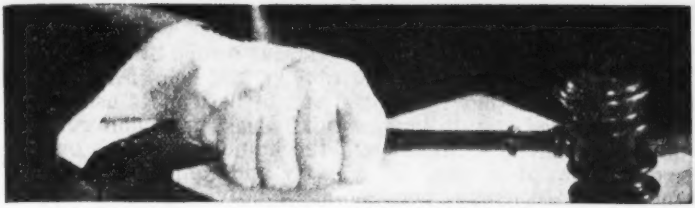
Opinion From Attorney General's Office

Recently the University presented to our State Auditor for payment a claim for the purchase of "one-half interest in a registered Guernsey bull named Indiana". The Auditor requested an opinion from this office as to whether the University could purchase "one-half of a bull." Mr. J. Edward Jacobson, Assistant Attorney General, submitted to the Auditor a brief opinion which we feel may bring a chuckle to your readers. We quote:

"In reply to your request for our opinion as to whether the University may purchase a one-half interest in a registered Guernsey bull named 'Indiana', we submit the following:

In re your question concerning a bull
Here follows our answer, complete and in full.
The purchase order to which you refer
Concerns 'Indiana', a 'him' not a 'her'.
The interest concerned is labeled 'one-half'
If not 'undivided' it may cause a laugh.
For one half is useful, the other eats food
We mean to be careful and not to be rude.
But upon the order we need this correction
So that the books will not fail on inspection.
Once having changed it to a part undivided.
We think the protection you need is provided."

Contributor: Lorna E. Lockwood
Assistant Attorney General
Phoenix, Arizona



Among the New Decisions

Appeal — *questions concerning trust estates not raised below.* In Atwood v. Holmes, — Minn —, 38 NW2d 62, 11 A2d 311, attorneys who obtained an allowance out of a trust estate, to the amount of which they raised no objection, having subsequently rendered other services, petitioned for and obtained a second order, covering all services, which did not indicate the amount allowed for the services subsequently rendered. The Minnesota Supreme Court, opinion by Justice Matson, held that the former order was res judicata of the value of the services first rendered and that its effect as a bar to a subsequent allowance of payment for the same services might be considered for the first time upon appeal.

The subject of the annotation in 11 ALR2d 317 is "Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below."

Automobiles — *imputation of driver's contributory negligence to owner.* The factual situation in Jacobsen v. Dailey, 228 Minn 201, 36 NW2d 711, 11 ALR2d 1429, involved a collision between two automobiles, each of which was driven by one of the owner's two sons for his own purpose. Under the terms of the pertinent statute, a person operating an automobile with the consent of the owner was, in case of accident, deemed the agent of the owner in the operation of the vehicle. In an action brought by one of the owners for damages to his car, against the other owner and his son, in which the latter owner counterclaimed for damages to his own car, a verdict was returned for the plaintiff. The verdict was held to be adequately supported by the evidence, which matter was not seriously disputed by the defendants, whose principal contention was based on claimed errors of law in the refusal of the trial court to give requested instructions to the jury based on the theory that the contributory negligence of the driver of the plaintiff's car was imputable to the owner, either under the statute or under the "family purpose"

or "family car" doctrine. This contention was rejected by the court, which held that the statute was intended only to impose liability for damages caused by the operation of a car, on a financially responsible person, and that the "family purpose" or "family car" doctrine was merged in, and abrogated by, the statute. The opinion is by Justice Magney of the Minnesota Supreme Court.

The appended annotation in 11 ALR2d 1437 discusses "Contributory negligence of driver of motor vehicle as imputable to owner under statute making owner responsible for negligence of driver."

Banks — *officer's powers respecting collateral held by.* In Alter v. Logan Trust Co., 360 Pa 491, 62 A2d 25, 11 ALR2d 1302, the Pennsylvania Supreme Court, in an opinion by Justice Jones, held that a bank officer had no implied authority to enter into an agreement with one whose property is about to be sold under a judgment in the bank's favor, that if the bank should bid in the property he might redeem it by paying a certain amount; that authority to enter into such an agreement was not conferred upon such officer by the provision of an agreement for the liquidation of a bank by which the property in question had been held in trust to pay the owner's debts, constituting such officer and other cotrustees with power to sell real estate "owned by" the liquidated bank "and held in its own name or in trust for its use and benefit," such provision relating to the liquidated bank's own property and conferring a power to be jointly exercised by cotrustees.

The appended annotation in 11 ALR2d 1305 contains an exhaustive discussion of all cases which discuss the power of a bank officer, in whatever capacity he may serve the bank, in respect to security or collateral held by the bank.

Carriers — *liability for injury to person assisting, meeting, greeting, etc. passenger.* The fact situation in the Massachusetts case of Zaia v. "Italia" Societa, 324 Mass 547, 87 NE2d 183, 11 ALR2d 1071, involved a woman who, on going without a pass on board ship to take leave of a departing passenger tripped on a loose strip of brass connecting two mats in a passageway, fell and was injured. The Supreme Judicial Court, in an opinion by Justice Williams, held that she was not an invitee to whom a duty of reasonable care was owed, and that a verdict in her favor in an action against the shipowner was properly set aside.

The annotation in 11 ALR2d 1075 contains an exhaustive discussion of the liability of a carrier for injuries to a person, who, without intention of becoming a passenger, boards its train, ship, streetcar, or bus, to assist, meet,

greet, or confer with, a particular passenger thereon.

Corporate Taxes — *effect of investment in other stock.* Double taxation is not affected, according to the Pennsylvania Supreme Court in Commonwealth v. Shenango Furnace Co., 362 Pa 491, 67 A2d 113, 11 ALR 2d 321, opinion by Justice Jones, by the refusal of the taxing authorities to permit the deduction by a domestic corporation from the value of its capital stock, for the purpose of a capital stock tax, of its investment in stock of a foreign corporation which, doing business in the state and employing property there, is subject to the state corporation franchise tax.

The question whether and under what circumstances investments in stock of other corporations, domestic or foreign, made by a corporate taxpayer, are to be included in the basis for its taxation, is exhaustively discussed in the annotation in 11 ALR2d 323 entitled "Inclusion of investments in stock of other corporations in fixing base for taxation of corporation."

Decedents' Estates — *valuation of for purposes of statutes limiting charitable devises or bequests.* The opinion of Justice Bromley, of the New York Court of Appeals, in Re Mayers, 299 NY 388, 87 NE2d 422, 11 ALR2d 1136, is thus summarized by the ALR editors: Where the amount which a testator is permitted by law to bequeath to charity is to be ascertained as of the time of his death, and the gift to charity, which exceeds the permissible amount, is of a remainder expectant upon the termination of a precedent estate, the amount which is distributable to the charity at the expiration of the precedent estate may be determined as follows:

Let x equal the amount which is distributable to charity.

Let a equal the value of the remainder at termination of the precedent estate.

Let b equal the maximum permissible gift to charity.

Let c equal the value of the remainder as of the testator's death.

Then —

$$\frac{x}{a} = \frac{b}{c}$$

The annotation in 11 ALR 2d 1142 exhaustively discusses "Valuation of estate for purposes of statutes limiting proportion that may be devised or bequeathed for charitable purposes; problems of computation."

Declaratory Judgments — *tax questions.* Boeing Airplane Co. v. Sedgwick County, 164 Kan 149, 188 P2d 429, 11 ALR2d 350, involved a situation wherein the Defense Plant Corporation, an agency of the United States, leased, with option to purchase, a manufacturing plant to one who agreed to pay all taxes lawfully assessed. Claiming that a

tax assessed upon the plant by state authority was illegal because the plant was exempt from state taxation as property of the United States, the lessee brought an action for a declaratory judgment against the state taxing authorities and the Reconstruction Finance Corporation as successor to its lessor, seeking a determination of the validity of the tax. The Reconstruction Finance Corporation raised no issue as to the power of the state to tax the property. The Kansas Supreme Court, in an opinion by Justice Burch, held that no justiciable controversy existed between the taxing authorities and the lessee, and therefore that the action was properly dismissed.

"Tax questions as proper subject of action for declaratory judgment" is the subject of the annotation in 11 ALR2d 359.

Dismissal or Nonsuit — *effect on previous orders.* In Bryan v. Smith, 174 F2d 212, 11 ALR2d 1402, the Seventh Circuit, in an opinion by Circuit Judge (now Associate Justice of the United States Supreme Court) Minton, held that where, in an action to impress a trust on real estate belonging to defendants for the payment of sums of money allegedly owing from them to plaintiffs, an interlocutory order is entered by agreement of the parties appointing a trustee and directing defendants to convey to him the lands in question to preserve the status quo pending suit, and thereafter the action is dismissed, with prejudice, upon stipulation of the parties, the order of dismissal leaves the situation as if suit had never been brought, and the court may not entertain a subsequent ancillary proceeding brought by the plaintiffs in which it is sought (1) to compel defendants to convey to plaintiffs described lands which allegedly were within the scope of the prior interlocutory order but had by fraud or mistake been omitted from the lands previously conveyed in accordance therewith, and (2) to adjudicate ownership of such lands in the plaintiffs.

The appended annotation in 11 ALR2d 1407 contains an exhaustive discussion of the question of the effect of a nonsuit, dismissal, or discontinuance of an action on previous orders or rulings in a case, as distinguished from proceedings, pleadings, etc., of the parties.

Estoppel — *of mortgagee to contest mortgagor's title.* Hicks v. Combs, 311 Ky 149, 223 SW2d 379, 11 ALR2d 1393, involved a situation wherein, during a boundary line dispute between property owners the descriptions in whose deeds overlapped, one of them purchased a vendor's lien note against the property of the other and started to foreclose the lien, whereupon the other paid the note. The attempt to foreclose was held by the Kentucky Court of Appeals, opinion by Commissioner Stanley, to be such recognition of the other's

title as to work an estoppel both as to the one who sought to enforce the lien and a co-owner from whom he held a power of attorney to do any and all acts concerning their right to or interest in the property.

The subject of the annotation in 11 ALR2d 1397 is "Estoppel of mortgagee to contest the mortgagor's title."

Executor — *delegation by will of power to name.* Re Estate of Tillie Effertz, — Mont —, 207 P2d 1151, 11 ALR2d 1278, involved a will which contained this provision: "I hereby direct that the Judge of the Court that admits this will to probate, ap point the nominee of the Roma Catholic Bishop of the Diocese of Great Falls, Montana, to ac as executor of this my Last Wi and Testament." The Montan Supreme Court, in an opinion b Justice Bottomly, reversed th judgment of the trial court an held on appeal that a testato may delegate to a person desig nated in the will the power t nominate an executor, and tha a nomination pursuant to th power given in the will was man datory upon the court. The lan guage used in the will was held to identify definitely and cer

"The people you sued were awfully nice about paying for your accident!"

tainly the person who was to nominate the executor.

The annotation in 11 ALR2d 1284, exhaustively discussing the "Delegation by will of the power to nominate executor," contains, in addition to cases from common-law jurisdictions, cases from the civil or Roman law areas of the British Commonwealth of Nations, since Roman law precedents are of value in relation to the question discussed.

Federal Courts — *conflicting jurisdiction.* The Sixth Circuit, in an opinion by Circuit Judge McAllister, held in Gillis v. Keystone Mutual Casualty Co., 172 F2d 826, 11 ALR2d 455, that since a pending proceeding in charge of a state insurance department for the liquidation of a dissolved, insolvent insurance company, in which a state court order has required creditors to file claims and has enjoined them from instituting actions against the company, should not be interfered with, a Federal district court in another state is required to decline to take jurisdiction of a subsequent suit against the company and others to recover damages for misrepresentation, for injunction against other actions, for the appointment of a receiver, the filing of claims, and a final settlement of the company's business.

The annotation in 11 ALR2d 460 contains an exhaustive discussion of the "Propriety of exercise of jurisdiction by Federal court in diversity of citizenship case, pending receivership, insolvency, or liquidation proceeding before state tribunal."

Federal Taxes — *waiver of restrictions on assessment and collection of deficiency in income, inheritance, or gift tax.* The First Circuit, in Associated Mutuals v. Delaney, 176 F2d 179, 11 ALR2d 896, held that where statutory restrictions on the assessment and collection of a Federal income tax deficiency have been unconditionally waived, the Commissioner of Internal Revenue is not obliged to give statutory notice of a deficiency before proceeding to assess and collect it, even though the taxpayer may not appeal to the Tax Court until such notice has been given. The opinion is by Chief Judge Magruder.

The annotation in 11 ALR2d 903 discusses "Waiver of restrictions on assessment and collection of deficiency in Federal tax."

Former Testimony — *mode of proof of.* In Meyers v. United States, 84 App DC 101, 171 F2d 800, 11 ALR2d 1, the defendant appealed his conviction of subornation of perjury of a witness testifying before a subcommittee of a United States Senate investigating committee. Objection was made that, on the second day of the trial, the chief counsel for the senatorial committee, who examined the witness for the subcommittee and heard all his

testimony, was permitted to testify as to what the witness had sworn to before the subcommittee, and that two weeks later, on the eleventh day of the trial, the government was permitted to introduce in evidence the stenographic transcript of the witness' testimony before the subcommittee. The District of Columbia Circuit of the Court of Appeals, opinion by Circuit Judge Miller, held, however, that while the transcript was admissible for this purpose, it was not the "best evidence" of what the witness had testified and that the testimony of counsel, or of anyone who had heard the testimony, was also admissible for this purpose. It was further held that the prosecution could present this proof in any order it chose, and that the order of introducing the evidence was not unfair to the defendant.

The "Mode of proof of testimony given at former examination, hearing, or trial" is exhaustively discussed in the extensive annotation in 11 ALR2d 30.

Gift — *by implication in inter vivos trust instrument.* In Brock v. Hall, 33 Cal2d 885, 206 P2d 360, 11 ALR2d 672, a father, in creating a trust for his two minor daughters until each should reach the age of thirty-five, when she should receive the corpus, provided for the contingency of either dying leaving issue before that time, for the contingency of either dying and leaving a husband surviving, and for the contingency of the death of either unmarried, in which latter case her share was to go to the other. One died after having married without leaving issue or a husband surviving—a contingency for which the trust instrument failed to provide. A majority of the California Supreme Court, in an opinion by Chief Justice Gibson, held that a gift over to the surviving beneficiary was implied, although the creator of the trust took a contrary position. The minority thought that to so hold was to impute to the trustor an intention which could not with certainty be said to exist.

The "Implication of gift in inter vivos trust instrument" is discussed in the annotation in 11 ALR2d 681.

Joint Tortfeasor — *defendant's right to bring in for purpose of contribution.* In Tarkington v. Rock Hill Printing & Finishing Co., 230 NC 354, 53 SE2d 269, 11 ALR2d 221, an action by an occupant of an automobile against the owner and the operator of a truck for personal injuries sustained in a collision between the car and the truck, the defendants, by plea, cross action and motion, brought in the driver of the automobile in which the plaintiff was riding, as a joint tortfeasor for the purpose of enforcing their statutory right of contribution against him. The trial court sustained the motion of the third person to dismiss the cross action on the ground

that in a former action between him and the present defendants it was determined that such third person was not contributorily negligent or chargeable by these defendants as joint tortfeasor, so that as between the third party and these defendants the former judgment was res judicata and a bar to the right of contribution. A judgment was entered in this action in favor of the plaintiff. On appeal the North Carolina Supreme Court, opinion by Chief Justice Stacy, affirmed the decision of the lower court sustaining the plea in bar and the motion to dismiss, holding that as the former judgment was res judicata as between the third party and the present defendants, and as the plaintiff had refused to join such third party in this action, the defendants should not thus take control of the present action and in effect compel the plaintiff to enforce his rights as against the third party, the driver of the car in which he was riding.

The annotation in 11 ALR2d 228 discusses "Right of defendant in action for personal injury or death to bring in joint tort-

"Ho-hum, wouldn't it be a scream if the boss came back a couple of days early!"

feasor for purpose of asserting right of contribution."

Limitation of Actions — *against cause of action for contraction of disease.* The plaintiff in Urie v. Thompson, 337 US 163, 93 L ed 1282, 69 S Ct 1018, 11 ALR2d 252, a former fireman on defendant's steam locomotives, filed suit in a state court to recover under the Federal Employers' Liability Act for injuries, alleging that after thirty years of service he had been forced to cease work by silicosis caused by continuous inhalation of silica dust which arose from sand materials emitted in excessive amounts by the locomotives' faultily adjusted sanding apparatus.

Upon the plaintiff's first appeal from an adverse judgment the state supreme court held that the petition failed to state a cause of action for negligence under the Federal Employers' Liability Act, but stated one under the Boiler Inspection Act, and hence remanded the cause for trial, which resulted in a verdict for the plaintiff in the amount of $30,000, based solely on a violation by the defendant of the Boiler Inspection Act. This judgment was reversed by the state supreme court on the ground that the Boiler Inspection Act did not cover silicosis.

Reversing the judgment of the state supreme court, the United States Supreme Court, in an opinion by Rutledge, J., unanimously held that the question whether the plaintiff's original petition stated a cause of action for negligence under the Federal Employers' Liability Act was properly reviewable by the court; that the action, as it was brought within three years from the discovery by the plaintiff of the disease, was not barred by the statute of limitations; and that silicosis is within the coverage of the Federal Employers' Liability Act, when it results from the employer's negligence.

A bare majority of the court held that silicosis was compensable also under the Boiler Inspection Act, and hence remanded the cause with instructions to reinstate the judgment on the verdict for the plaintiff.

An exhaustive discussion of "When limitation period begins to run against cause of action or claim for contracting of disease" is contained in the extensive annotation in 11 ALR2d 277.

Maps or Plats — *of subdivision; regulations as to.* In the situation involved in Ayres v. City Council of Los Angeles, 34 Cal2d (Adv 29), 207 P2d 1, 11 ALR2d 503, applicable statutes vested control of the design and improvement of real estate subdivisions in the governing bodies of the cities and counties in which such subdivisions lay, subject to review as to reasonableness by the courts, and provided for proceedings to secure approval by the proper local authorities of proposed subdivision maps. After the proper munici-

al authorities had refused approval of a map proposed by im, except on compliance with ertain conditions, petitioner rought the present proceeding n mandamus to compel defendnt city council to approve his ap without the conditions.

The California Supreme ourt, in an opinion by Justice henk, overruled the petitioner's ontentions (1) that under a roper construction of the appliable statutes and ordinances the onditions imposed were beyond he powers of the city and its ofcers and (2) that such condiions constituted, under the circumstances shown, an attempted xercise of the power of eminent omain under the guise of an exrcise of the statutory authority o approve subdivision maps and ence were unconstitutional unss proper compensation was aid, and affirmed the judgment elow denying the relief sought.

The extensive annotation in 1 ALR2d 524 contains an exaustive discussion of the cases nvolving the "Validity and conruction of regulations as to ubdivision maps or plats."

Parole Evidence Rule — *application to agreement not to compete.* In Langenback v. Mays, 05 Ga 706, 54 SE2d 401, 11 LR2d 1221, an oral agreement y the seller of land on which here were tourist cabins, that e would not use his adjoining roperty in competition with the urchaser, was held by the Geora Supreme Court not at variance with, but collateral to, the written contract of purchase, and therefore provable by parol. The purchase of the property in reliance on the agreement was held to take it out of the provisions of the statute of frauds requiring contracts not performable within a year to be in writing. The contract was held not lacking in definiteness in failing to specify the portion of the defendant's property not to be used in competing. The opinion is by Chief Justice Duckworth.

The appended annotation in 11 ALR2d 1227 exhaustively discusses the precise question of whether the parol evidence rule is applicable to an oral agreement by the vendor not to engage in competition with a business the sale of which was the subject of a contemporaneously written contract of purchase or sale or was evidenced by some written instrument other than a contract of purchase and sale.

Picketing — *by nonemployees.* In Pennsylvania Labor Relations Board v. Chester & Delaware Counties Bartenders, 361 Pa 246, 64 A2d 834, 11 ALR2d 1259, the Pennsylvania Supreme Court, in a per curiam opinion affirming the court below, held that a state may not, consistently with the constitutional right of free speech protected from state action by the Fourteenth Amendment, prohibit peaceful picketing of a place of employment by persons not employed therein or make it unlawful for union sym-

pathizers to refuse to cross the picket line, though the effect is to hinder or prevent the establishment picketed from obtaining deliveries of goods.

The appended annotation in 11 ALR2d 1274 considers the narrow question of whether, without regard to the legality of its purpose, peaceful picketing of a place of business may become unlawful merely because carried out by persons who are not employed there.

Picketing—*injunction against in absence of dispute between employer and employees.* The Washington Supreme Court, in an opinion by Justice Simpson held in Gazzam v. Building Employees, Etc., Union, 29 Wash2d 488, 188 P2d 97, 11 ALR2d 1330 that the picketing by the members of a labor union of the premises of an employer whose employees are unwilling to join the union, for the purpose of compelling him to enter into a contract with the union which would require that they should become members, is, where its effect is coercive, not a permissible exercise of the right of free speech, and is unlawful as at variance with the policy declared by the state Labor Disputes Act that workers shall be free to

"You were in the ladies' room so long I thought you'd quit!"

Who Gets The Welfare In A "Welfare State"?

That's easy. There's a formula. You've seen it. Be sure you recognize it next time. Here's how it goes:

Somebody promises to give you something (a subsidy, or a wage increase without a production increase), if you'll give him a little something in return—just a little something—a vote, perhaps.

So, you give and you get. Or you think you do. Maybe what you get increases the national debt or decreases corporation profits. What do you care? Let's see:

National debt? That's mortgaging your child's future. Let the rich pay it? That's silly. Take every penny every one of them has, and you wouldn't make more than a dent in the national debt. Every dollar added to it by the giveaway bureaucrats has to be paid back by you and your children and your grandchildren.

Take it out of corporation profits? If all the profits of all the corporations were taken, you would pay only a tiny fraction of the national debt.

The plain truth is that no one is giving you anything. Last year it was reported that the federal government "gave" to the states five and a half billion dollars. That money, of course, first came from the states. But we are informed $625,000,000 of it never got back to the states—that was the cost of taking it away from you, and giving part of it back.

When anyone promises you something for nothing, you can be sure he gets a lot of the something, and you get a lot of the nothing.

Shepard's Citations

Colorado Springs
Colorado

enter into association with one another or to decline to do so.

The annotation in 11 ALR2d 1338 exhaustively discusses "Legality of, and injunction against, peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions of employment."

Poverty Affidavit — *filing by nonparty as condition of suit or appeal in forma pauperis.* Appealing from a dismissal of her complaint for claims under the Fair Labor Standards Act, the petitioner, in Adkins v. E. I. Du Pont de Nemours & Co., 335 US 331, 93 L ed 43, 69 S Ct 85, 11 ALR2d 599, filed in the district court and in the circuit court of appeals motions that the appeal be allowed in forma pauperis. These motions were denied on various grounds, among which were the grounds that other claimants involved, as well as petitioner's attorneys, employed on a contingent fee basis, had not filed affidavits of poverty. Vacating the orders denying the appeal in forma pauperis, the United States Supreme Court, in an opinion by Mr. Justice Black, held that the motion could not be denied merely because the other claimants and the petitioner's attorneys had not filed such affidavits.

The annotation in 11 ALR2d 607 discusses "Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant."

Property Tax — *removal from state.* The fact that goods are being packed for export does not withdraw them from the sphere of local taxation where on tax day they have not actually been shipped, according to the opinion of Justice Edmonds, of the California Supreme Court, in Empresa Siderurgica v. Merced, 32 Cal2d 68, 194 P2d 527, 11 ALR2d 934.

The annotation in 11 ALR2d 938 contains an exhaustive review of the cases dealing with the power of a state or other local government to levy a tax on property destined for, or in the course of removal from a state, as affected by the provisions of the Federal constitution vesting in Congress power to regulate interstate and foreign commerce, and prohibiting the states, without the consent of Congress, except in certain cases, from laying any imposts or duties on exports.

Radio Broadcasting — *local taxation of as burden on commerce.* In Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 NM 332, 184 P2d 416, 11 ALR 966, a broadcasting company was held by the New Mexico Supreme Court, opinion by Chief Justice Brice, to be subject to payment of a tax based on its gross receipts from local

advertisers for local business under an emergency school tax statute purporting to place a tax of two (2) per cent of the gross receipts of the business of broadcasting, and which provided that none of the taxes should be construed to apply to any business exempted from taxation under the United States Constitution. This decision was based on the ground that "local advertising broadcasts" were, as a practical matter, intrastate business notwithstanding the fact that they might be heard by people outside the state, and that in any event such advertising of local business to secure local patronage was a "taxable event" open to the states.

The annotation in 11 ALR2d 986 discusses "Subjecting radio broadcasting business to local taxation as burden on commerce."

Res Ipsa Loquitur — *damage by overflow or escape of water.* Eaves v. Ottumwa, — Iowa —, 88 NW2d 761, 11 ALR2d 1164, involved the following facts: A raceway leading from a river to defendant's hydroelectric plant overflowed in a time of flood. The opening of floodgates, which kept the level of the water in the raceway at that of the river, would have increased its carrying capacity; but the defendant, apprehending danger to a bridge if the gates should be opened, delayed opening them until advised by an army engineer to do so. Shortly after they were opened the overflow lessened, and presently entirely ceased. The Iowa Supreme Court, in an opinion by Justice Garfield, held that the defendant was under an obligation to use reasonable care to prevent damage to neighboring property from escaping water, and the evidence was held to warrant submission to the jury of the question whether due care had been used.

It was further held that if defendant had failed to exercise reasonable care it could not escape liability by showing that under conditions existing prior to the construction of its dam and raceway the river would have overflowed plaintiff's property, and that the jury were not bound to accept opinion evidence that it would have done so.

The fact that specific as well as general negligence was alleged was held not to preclude plaintiff from invoking the res ipsa loquitur doctrine in support of his allegation of general negligence; but the circumstances were held not to be such in which the doctrine was properly applicable.

The subject of the appended annotation in 11 ALR2d 1179 is "Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water."

Res Judicata — *judgment against partner as.* In Dillard v. McKnight, 34 Cal2d (Adv 265), 209 P2d 387, 11 ALR2d 835, an action to recover dam-

ages for the death of the plaintiff's son as the result of injuries sustained by him in a collision between an automobile in which he was riding and another automobile, judgment was rendered in the trial court for the plaintiff upon a finding that the named defendant was the employer of the driver of other automobile and that such driver was acting within the scope of his employment at the time of the collision. The California Supreme Court, opinion by Justice Spence, held on appeal that such judgment did not preclude copartners of the named defendant, who were not joined until after the rendition of the judgment, from relitigating the question whether the driver of the defendant's automobile was acting within the scope of his employment at the time of the collision.

The annotation in 11 ALR2d 847 discusses "Judgment for or against partner as res judicata in favor of or against copartner not a party to the judgment."

Sales — *seller's right to retain down payment.* In Thach v. Durham, — Colo —, 208 P2d 1159, 11 ALR2d 690, the opinion of Justice Stone of the Colorado Supreme Court, as summa-

"I can't read my shorthand notes, so I'm just mailing them out . . ."

rized by the ALR editors, is as follows: The owner of two bands of sheep offered them for sale and a buyer agreed to purchase them under such description, but upon reduction of the agreement to writing they were described as 1,550 head of ewes, with lambs at side, at a certain sum per head. However, as the buyer reserved the right to reject any with broken mouths, the contract was construed as not requiring the delivery of the exact number. Delay in delivery was held to have been waived, and the buyer consequently not justified in refusing to accept delivery. The seller was held entitled to retain a down payment but to recover as damages only any excess of damages over the amount of the down payment.

The annotation in 11 ALR2d 701 discusses "Seller's right to retain down payment on buyer's unjustified refusal to accept goods."

Sales Tax — *on parts or repairs.* Merriwether v. State, — Ala —, 42 So2d 465, 11 ALR2d 918, was concerned with the liability for a sales tax imposed on sales at retail on the part of a wholesale dealer in automobile parts and other repair supplies who sold goods to retail automobile dealers, who in turn used such parts and supplies to recondition used cars owned by them, preparatory to resale. The Alabama Supreme Court, in an opinion by Justice Lawson, held that the sales of such goods for such purposes were subject to the tax that it was the duty of the seller to make reasonable inquiry into the nature of the purchaser's business in order to ascertain whether a sale was taxable, and that the state was not estopped to assert liability by the previous failure of the taxing authorities to collect the tax or to promulgate regulations asserting the taxability of the transaction.

"Sales tax on parts, repairs, or constituents used in repair of article" is discussed in the annotation in 11 ALR2d 926.

Specific Performance — *of contract for sale or option of real property as affected by change of conditions.* In Simmerman v. Fort Hartford Coal Co., 310 Ky 572, 221 SW2d 442, 11 ALR2d 381, the owner of coal lands granted a mining lease for a stated term on a royalty basis. The lease gave the lessee an option, exercisable at any time during the term, to purchase the coal at a fixed price and to have royalties paid under the lease credited on the purchase price. At the time of execution of the lease the coal-mining industry was depressed, but during its term improved business conditions greatly increased the value of the property. The lessee accordingly elected to exercise the option at a time when royalty payments amounted to more than the agreed price of the property. The Kentucky Court of Appeals, opinion by Justice Knight, held in the lessee's suit

for specific performance that the lessee's breach of conditions had not terminated his rights under the lease; that the lessee had not taken undue advantage in procuring the execution of the lease; that the fact that the royalties exceeded the purchase price did not render the agreement to sell void for want of consideration; that it was not lacking in mutuality because not enforceable against the lessee prior to the exercise of the option; and that specific performance should not be denied on the ground of laches.

An exhaustive examination of the cases involving an action for the specific performance of contract for the conveyance of land, in order to determine the effect of events or circumstances arising after the execution of the contract, as constituting hardship or injustice which will influence equity to withhold the relief sought, will be found in the annotation in 11 ALR2d 390 entitled "Change of conditions after execution of contract or option for sale of real property as affecting right to specific performance."

Streets and Highways — *liability of abutting owner for damages by fall of tree in.* In the situation involved in Caminer v. Northern & London Investment Trust, 2 KB 64, 11 ALR2d 617, an elm tree 120 to 130 years old, which is less than half the ordinary life of an elm, standing on property adjacent to a highway, was felled by an ordinary gust of wind, injuring persons driving along the highway. It had not been lopped for some time, but its crown of foliage was not of extraordinary size. After the tree fell it was discovered for the first time that disease had attacked the roots, causing them to rot. Although there was testimony to the effect that elms, being shallow-rooted, should be lopped from time to time, the occupier of the property was held not liable by the English Court of Appeal to the persons injured, either on the ground of negligence or of nuisance, where nothing in the appearance of the tree indicated that it was likely to be blown over.

An exhaustive discussion of this and other cases involving the "Liability of owner or occupant of abutting property for damage caused by fall of tree into highway" will be found in the annotation in 11 ALR2d 626.

Streets and Highways — *use of subsurface for other than sewers, pipes, etc.* The use, by a city, of the subsurface of one of its streets for an automobile parking garage is a proper highway use, according to the Michigan Supreme Court in Cleveland v. Detroit, 324 Mich 527, 37 NW 2d 625, 11 ALR2d 171, opinion by Justice Bushnell, for which an abutting property owner is not entitled to any compensation in the absence of a widening of

the street or other damage to his property.

The annotation in 11 ALR2d 180 contains an exhaustive discussion of "Right of municipality or public to use of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like."

Suicide — *civil liability for.* In Scott v. Greenville Pharmacy, 212 SC 485, 48 SE2d 324, 11 ALR2d 745, the defendant druggist in selling a sedative without a physician's prescription violated the law, and failed to warn the purchaser that its use might be habit-forming. The purchaser became an addict and continued to obtain the drug from the defendant. While suffering from mental depression consequent upon the habitual use of the drug, he committed suicide by hanging. An action for his death was brought against the druggist under a statute which gives a right of action only if an action might have been maintained by the decedent.

The South Carolina Supreme Court, affirming a judgment dismissing the action upon demurrer, held, in an opinion by Justice Fishburne, that, although the sale in violation of the statute was negligence per se, the

"Let's try looking where it shouldn't be."

consequence was not reasonably foreseeable, and therefore that the defendant's act was not the proximate cause of the suicide. It was further held that the fact that the decedent himself, if living, would have been precluded by contributory negligence from suing the druggist, was a defense.

The extensive annotation "Civil liability for death by suicide" in 11 ALR2d 751 contains an exhaustive discussion of whether and under what circumstances a civil liability exists for causing a person to commit suicide.

Temporary Alimony — *effect of defendant's denial of marriage on right to.* In Alvernes v. Alvernes, — RI —, 66 A2d 373, 11 ALR2d 1036, a woman who had brought a suit for separate maintenance against her alleged husband applied for temporary alimony and suit money. The defendant resisted the application on the ground that the alleged marriage relation did not exist. It was held by the Rhode Island Supreme Court, opinion by Justice Baker, that to warrant granting of the application there must be prima facie evidence of the existence of the marriage relation; that such evidence was not supplied by the allegations of the petition, even though sworn to; and that defendant should on such application be permitted to cross-examine the plaintiff as to the existence of such relation, particularly where it appears that plaintiff is relying on a common-law marriage.

"Defendant's denial in action for divorce, separate maintenance, or alimony, that parties are married, as affecting plaintiff's right to temporary alimony or suit money" is the subject of the annotation in 11 ALR2d 1040.

Verdicts — *trial or appellate court's power to reduce or set aside as affected by prohibition of re-examination of facts tried by jury.* In Van Lom v. Schneiderman, — Or —, 210 P2d 461, 11 ALR2d 1195, a constitutional provision that no fact tried by a jury shall otherwise be re-examined in any court unless the court can affirmatively say that there is no evidence to support the verdict was held by the Oregon Supreme Court, opinion by Chief Justice Lusk, to preclude the setting aside of a verdict in a tort action as excessive in awarding either compensatory or punitive damages. Such provision was held equally operative in the appellate court notwithstanding a further constitutional provision that such court, if of the opinion that it can determine what judgment should have been entered in the court below, may direct such judgment to be entered.

The annotation in 11 ALR2d 1217 discusses "Constitutional or statutory provision forbidding re-examination of facts tried by a jury as affecting power to reduce or set aside verdict

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because of excessiveness or inadequacy."

Wills — *rights and remedies against interference with making, changing, etc.* Legatees who by fraud, duress, or undue influence prevent the execution of a new will leaving testator's property to others, hold the property thus acquired upon a constructive trust for such others, according to the New York Court of Appeals, in Latham v. Father Divine, 299 NY 22, 599, 85 NE2d 168, 86 NE2d 114, 11 ALR2d 802. The opinion is by Justice Desmond.

An exhaustive discussion of "Rights and remedies against one who induces, prevents, or interferes in the making, changing, or revoking of a will, or holds the fruits thereof" will be found in the extensive annotation in 11 ALR2d 808.

Witnesses — *competency of spouse as in crime against other spouse.* The Eighth Circuit, in an opinion by Circuit Judge Johnsen, held in Shores v. United States, 174 F2d 838, 11 ALR 2d 635, that a husband's transportation of his wife in interstate commerce for the purpose of having her engage in prostitution is a personal wrong against her within the common-law exception to the incompetency of a wife's testimony against her husband and makes her testimony admissible in a prosecution of the husband under the Mann Act, notwithstanding her statement that she does not wish to testify against him.

The annotation "Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution" in 11 ALR2d 646 contains an exhaustive collection and analysis of the cases which determine what constitutes a "crime" by one spouse against the other, so as to render the injured spouse a competent witness against the offender.

Ain't It a Fact

Conviction is what some people never have until after the judge has pronounced sentence.—O. A. Battista

A Translation of an Inscription Found in Ancient Rome

Contributed by JAMES J. MASON
Villanova College
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